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No. 90-1457

In The

Supreme Court of the United States

October Term, 1990

MARCIA J. LITTLES, M.D.,

Petitioner,

vs.

AREA HEALTH DEVELOPMENT BOARD,
MOSTELLAR MEDICAL CENTER,
JAMES A. HOLLAND, and TYLER W. PEEK

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

1. PROCEEDINGS BELOW.

Respondents adopt the petitioner's "Statement Of The Case" as stated on page 4 through 6 in the petitioner's

Petition for Writ of Certiorari and incorporates same into Respondents' Brief in Opposition.

2. STATEMENT OF THE FACTS

Petitioner, Marcia J. Littles' Statement of the Facts mischaracterizes the petitioner's employment history with the Area Health Development Board, the Mostellar Medical Center, its Board Chairman, Tyler W. Peek and its Executive Director, James A. Holland. The petitioner's Statement of Facts is misleading and inaccurate while referring to improper citations to the record. Further, the facts made the basis for the petitioner's alleged reasons for granting the writ are contrary to the Federal District Court's, Finding of Facts and Conclusions of Law which were affirmed by the United States Court of Appeals for the Eleventh Circuit.

a. No Intentional Discrimination Or Retaliation Was Practiced Upon The Petitioner

The petitioner, a National Health Service Corporation scholarship candidate, was employed by the Mostellar Medical Clinic to practice medicine at the new expansion site of the Mostellar Medical Clinic known as the Grand Bay Clinic on or about July 16, 1986. (R2-13-17), (R2-133, 134) The petitioner accepted a "private practice assignment" with the Area Health Development Board to fulfill her commitment to repay the Federal government for funding her medical education and she received a starting salary which was higher than eight of ten other

physicians employed at the Mostellar Medical Center. Of the physicians actively employed when the petitioner was terminated, petitioner was making a salary greater than six of those eight individual physicians. See Respondent's Exhibit 1.

The Respondent, James A. Holland is the Executive Director for the Area Health Development Board responsible for administering medical care at both the Mostellar Medical Center and the Grand Bay expansion site. Respondent Holland testified that in the fall of 1986 he received numerous complaints about Dr. Littles turning patients away on a continuous basis and that he was concerned with her low patient encounters. (R3-422, 423) Dr. Alan Shain, a former Medical Director for the Mostellar Medical Clinic (who resigned in July of 1987) corroborates Respondent Holland's testimony. Dr. Shain testified that he discussed with Petitioner Littles her poor performance and low patient encounters in the fall of 1986 shortly after she was employed. (R3-311) Dr. Shain stated the petitioner's reaction was cold and without much response. (R3-313) Dr. Shain recognized that low patient encounters had to be improved to justify expenditures necessary to maintain the Grand Bay Clinic. (R3-311, 312) Dr. Shain testified the petitioner was slow in patient delivery. In addition, Dr. Shain stated that Dr. Littles could not take criticism; was not a team player; that she was hostile to all employees and that support personnel were fearful of working with Dr. Littles when assigned to the clinic. (R3-315-317) Dr. Shain

testified that all nurses and support personnel who disliked working with Petitioner Littles were very competent personnel. (R3-317) Exhibit 2 entitled "Job Description for Medical Director" lists as a qualification that the applicant "Must be sensitive to the problems and needs of people from widely divergent cultural backgrounds. Must exemplify leadership potentials in the development of a team approach toward establishing a comprehensive health service delivery system."

Dr. Shain discussed with Respondent Holland his concerns regarding Dr. Littles' low patient encounters and the fact that she consistently and intentionally turned away patients on a daily basis. (R3-323, 328, 329) Dr. Shain stated that Atlanta, Georgia [the Federal Funding source] set a standard that each doctor should see about 18 patient encounters, on site, per day. (R3-324) He stated that low patient encounters would result in the closing of the medical clinic. (R3-311-312) Dr. Shain stated that Petitioner Littles was turning patients away as early as October of 1986 from the Grand Bay Clinic. (R3-328, 329) Respondent Holland testified that after many attempts to improve the low patient encounters, he received no cooperation from Petitioner Littles. Dr. Littles testified that within 4 months after she was hired, she requested a $10,000.00 pay raise. (R2-138) While asking for a substantial pay raise with no monies available for said raise, Petitioner Littles notified the Clinic Board that she filed an EEOC complaint against the Area Health Development Board, Inc. During the same period of time she sent a demand to renegotiate her 1987 contract,

requesting a $14,000.00 pay raise. (R2-143) All of these matters had been brought to the attention of the Board and were reflected in the Board Minutes as identified in Respondent's Exhibit 18.

Mr. Holland testified that Dr. Littles continued with low patient encounters until he developed a recommendation for her termination in May of 1988. (R3-440) Respondent Holland testified that Petitioner Littles' poor performance in the area of low patient encounters and her constant refusal to treat patients formed the basis of this recommendation. Mr. Holland adamantly denied that Petitioner Littles was terminated because of race and/or sex and he stated that her poor job performance justified her termination. (R3-437-441) Mr. Holland stated that Petitioner Littles had told her secretaries and receptionists that she did not want to see patients for up to two weeks and that she cancelled patients who had appointments on a daily basis. (R3-439, 440) Respondent Holland warned Dr. Littles in a letter dated November 21, 1986, identified as Respondent's Exhibit 9, that she should strive to see at least 18 patients by the end of the first year at the clinic or federal funding would be adversely affected. Petitioner Littles was required to see at least twelve patients per day, a standard which she never achieved. (R3-420, 421) The Board minutes reflect that Petitioner Littles was seeing only 6 patients per day from August of 1986 through December of 1986. See Respondent's Exhibit 5.

Dr. Raymond Broughton, a black male physician was hired as a Physician-Medical Director at the Mostellar Medical Clinic during July of 1987. (R2-214) Although petitioner contends that she saw more patients than given credit for, Dr. Broughton testified that the patient appointment list, presented by Petitioner Littles as an encounter list during trial, merely indicated the number of appointments in petitioner's appointment book. After examining her appointment list it was determined that it substantially over-represented the number of patient encounters and did not represent patients actually seen. (R2-233, 234) Dr. Broughton stated that Petitioner Littles was definitely not a team player and did not exhibit a team approach to anything. (R3-291, 292) Dr. Broughton stated that Petitioner Littles had a problem everyday; that she was a problem maker and not a problem solver. (R3-290-293) Dr. Broughton testified that Petitioner Littles had low patient encounters and that he warned her on numerous occasions that low patient encounters and/or low productivity at the Grand Bay site could result in either the clinic being closed for lack of funding or her being terminated to which she responded, "that's life in the big city." (R2-223)

Dr. Broughton stated that Petitioner Littles continuously turned patients away who were seeking medical treatment and that these concerns were brought to the attention of he and Mr. James Holland. (R2-222-223) Dr. Broughton stated that many complaints were received from patients about Petitioner Littles. He stated

that patients were turned away, appointments were cancelled, patients were asked to leave who were in the medical office waiting to receive treatment and that none of the co-employees or the support help desired to work with Petitioner Littles. (R2-236, 237, 239, R3-274)

Dr. Broughton testified that no other physicians with the exception of Petitioner Littles employed by the Mostellar Medical Clinic have ever refused to see a patient or turn a patient away. (R3-298-299) Dr. Broughton stated that Dr. Littles was not meeting the standard of patient encounters set by the National Health Service Corporation and that the other physicians were always striving to meet the standards in order to keep federal funding. (R3-299) Dr. Broughton also stated that Dr. Ashbee, a white female was offered the job of Medical Director prior to Dr. Broughton accepting the position. Dr. Broughton said that Dr. Ashbee refused the position because she wasn't interested. (R2-231) Dr. Broughton concurred with Mr. Holland's recommendation and the Board's decision to terminate Petitioner Littles. He stated that Mr. Holland's concerns about Littles' improper patient care were legitimate and that in his opinion she was not terminated because of sex or race. (R2-239, 230) The District Court heard an abundance of evidence from additional witnesses, through documentation and Board minutes concerning the low productivity and improper patient care of Petitioner Littles. The Receptionist, Jackie Poriux who worked with Petitioner Littles from May of 1987 through May of 1988 stated that Petitioner Littles almost everyday rescheduled patients

and cancelled appointments thereby denying proper medical treatment. (R3-336-338) She demonstrated to the Trial Court the manner in which Petitioner Littles would go through her appointment book on a daily basis and instruct the receptionist to cancel patients. (R3-338) Ms. Poriux testified that Petitioner Littles left patients in waiting rooms for over an hour while she typed letters in her office. (R3-339) Ms. Poriux's testimony was uncontradicted and virtually unchallenged by petitioner. (R3-342, 343)

Paula Thompson, a Clerk Receptionist who worked for Petitioner Littles, testified Petitioner Littles instructed her to turn patients away almost everyday. (R3-344-345) Ms. Thompson also demonstrated to the Court how Petitioner Littles would go through her appointment book during the morning and instruct the receptionist to cross out various patients and cancel their appointments. (R3-345) Ms. Poriux saw Dr. Littles turn patients away on a continuous basis who were sick and described this situation as being very embarrassing. (R3-345, 346) The cancellation of patients by Petitioner Littles during January 21 through February 3 corroborated by Ms. Poriux and Ms. Thompson is the subject matter of Dr. Broughton's letter forwarded to Dr. Littles dated January 22, 1988 and identified as Respondent's Exhibit 25. Ms. Thompson stated that Petitioner Littles arbitrarily took patients off the appointment books and cancelled their appointments on a continous basis. (R3-345) Ms. Thompson's testimony was uncontradicted and virtually unchallenged by the petitioner. (R3-348, 349)

The Chairman of the Area Health Development Board, Inc., Mr. Tyler Peek, stated that Petitioner Littles was not terminated because of race or sex. (R3-359, 360) The chairman testified that Petitioner Littles was not denied the Medical Directorship because of sex or race. (R3-357, 358) The chairman testified that patient encounters and low productivity had a direct impact on federal funding. (R3-357) He testified he was extremely concerned with the liability problems Dr. Littles was creating by turning sick patients away. (R3-359, 360)

Mr. Peek testified that Mr. Holland was responsible for the administrative affairs of the Mostellar Medical Clinic and the Area Health Development Board. It was the chairman's understanding that if physicians did not strive to meet the standard number of patient encounters that the clinics would be closed. (R3-353, 354, 362, 387, 398) The chairman, Tyler Peek stated that if Mr. Holland allowed low patient encounters or patients to be turned away, Holland would not be doing his job. (R3-388) Chairman Peek testified that Mr. Holland makes recommendations regarding the employment and termination of all personnel as the Executive Director for the Area Health Development Board. (R3-354)

Chairman Peek testified that all Area Health Development Board meetings are held on a regular basis at which times Mr. Holland attends along with the Board members. Chairman Peek stated that he concurred with Mr. Holland's recommendation that Dr. Broughton be hired as Medical Director. (R3-358) He stated that all

physicians were considered by the Board for the position of Medical Directorship and that the postition had originally been offered to Dr. Susan Ashbee, a female physician prior to being offered to Dr. Broughton. He stated Dr. Ashbee declined the position. (R3-358) He stated that Petitioner Littles was not denied the Medical Director position because of sex. (R3-358) Chairman Peek testified that petitioner Littles received two pay raises subsequent to filing her EEOC complaint and that her contract was renewed subsequent to the filing of the EEOC complaint and that she remained at the same position without loss of any benefits or salary until May of 1988. (R3-387) Chairman Peek concurred with the recommendation of Mr. Holland to terminate Petitioner Littles because of low patient encounters and the refusal to treat patients (R3-360)

Ms. Alphonsine Patterson, Administrative Assistant to the Executive Director of the Mostellar Medical Center, stated that Petitioner Littles was cold and unconscious to individuals and not a team player. (R3-399) Ms. Patterson stated that Petitioner Littles was a problem creator. (R3-399) Ms. Patterson testified that Dr. Broughton met the qualification of exemplifying leadership potential in the development of a team approach towards establishing a comprehensive health service delivery system. (R3-398) Ms. Patterson testified that Dr. Broughton was fully qualified for the Medical Directorship and that he was a kind, considerate person whom the staff fell in love with; all patients adored him. (R3-397, 398) Ms. Patterson testified that Dr. Broughton never refused to see any

patients and the only doctor that she knew that turned away patients during her eight years of employment was Petitioner Littles. (R3-398, 399)

Ms. Patterson testified that Mr. James Holland always strived to administer the affairs of the clinic in the best professional manner. (R3-400) She stated that Mr. Holland does not discriminate racially or sexually towards any employee and that he was of high character and a true professional. (R3-400, 401) She testified that at no time during Dr. Littles appointment did Mr. Holland or any member of the Board display any racial or sexual discrimination towards Dr. Littles or to anyone else employed by the Mostellar Medical Center. (R3-399-401)

The Court's findings were not contradicted by the minutes of the Respondent Board, nor the trial exhibits. The respondents' trial exhibit number 5, clearly demonstrates the problems with the petitioner's low patient encounters. Further, exhibit 11 representing the Board minutes of the Area Health Development Board dated December 19, 1986 accurately reflects the ongoing problems with the petitioner's low patient encounters. In addition, Respondent, Holland notified the petitioner by letter dated November 21, 1986 (See Respondent's Exhibit 9) that her on site encounters during the month of October of 1986 averaged six patients per day which was far from satisfactory.

The record is replete with an abundance of evidence regarding the petitioner's unsatisfactory performance

which is contained in live testimony presented by seven witnesses and through the petitioner's own testimony by way of cross-examnination. In addition, the trial exhibits including Board minutes clearly show an abundance of documentation concerning low patient encounters on the part of the petitioner, the intentional turning away of patients by the petitioner and the refusal of the petitioner to treat patients on a professional basis. Dr. Broughton testified that the petitioner had low patient encounters and that she was warned on numerous occasions about the low patient encounters. (R2-223) Dr. Broughton testified that no other physician refused to treat patients or turned patients away other than the petitioner. (R3-298-299) Dr. Broughton testified the petitioner turned patients away on a regular basis which caused great concern to the Area Health Development Board in regards to liabilitiy and patient care. (R2-222, 223) These concerns were discussed by the Board and reflected in the Board minutes on many occasions. (See Respondents' Exhibit 11, 14, 15, 17, 22 & 24)

Dr. Alan Shain testified that he recognized Petitioner Littles might be terminated because of her personality problems and low patient encounters. (R3-323) Dr. Shain testified he notified Petitioner Littles about her poor performance and low patient encounters in the fall of 1986. (R3-311) Dr. Shain testified that Petitioner Littles was slow in patient delivery. (R3-313)

Without reiterating all of the respondents' witnesses testimony, respondents submit that the chairman of the

Area Health Development Board, Mr. Tyler W. Peek was well aware of the many problems concerning Petitioner Littles prior to the recommendation of her termination. Chairman Peek testified that patient encounters and low productivity had a direct impact on federal funding. (R3-357) Chairman Peek testified that Board meetings are held on a regular basis, that Mr. Holland attends the Board meetings and makes recommendations regarding the employment and termination of all personnel for the Area Health Development Board. (R3-354) Chairman Peek said all physicians were considered for the position of medical directorship by the Board and that the position had been offerd to a female, Dr. Susan Ashbee who declined to accept same. (R3-358) Chairman Peek testified he accepted Mr. Holland's recommendation to terminate Littles because of low patient encounters and the turning away or refusal to treat patients. (R3-360) Chairman Peek testified that Petitioner Littles did not strive to meet the criteria of patient encounters established by the funding authority. (R3-390)

b. The Area Health Development Board, Incorporated is a *Private* Non-Profit Corporation.

Chairman Peek testified that his position was a non-paying position and the Area Health Development Board was a non-profit *private* corporation. (R3-351, 352) The petitioner herself states on page 7 of petitioner's writ that the petitioner accepted a *"private practice assignment"* with the Respondent Medical Center. Further petitioner states on page 11 of her writ that Dr. Broughton, like the

petitioner, was seeking a *"private practice assignment"* to complete his National Health scholarship service obligation. The record reflects that the petitioner and Dr. Broughton accepted a "private practice assignment" at a private non-profit corporation known as the Area Health Development Board, Inc. The petitioner's argument as to why the writ should be granted is fatally flawed. The facts do not support a finding by the District Court that the minutes of a non-profit private corporation must be kept, much less be accurate. In other words, the Area Health Development Board is not a public agency, board or a commission. Even if the petitioner's theory could possibly hold water (that the District Court's findings of fact should not be contrary to facts contained in lawful minutes of *public* bodies without showing that the minutes are in error) such a theory has no relevancy to the Court's findings in this case.

There is no requirement that the Area Health Development Board maintain minutes. As it stands, the minutes submitted to the District Court are not in conflict with the testimony of the witnesses nor the documentary evidence and trial exhibits introduced during the trial of this case. No other physician performed in such an unsatisfactory manner as the petitioner while employed at the Area Health Development Board. The record clearly shows that the respondents were concerned with low patient encounters which could place the respondents in jeopardy of losing federal funding. (R3-425) (R3-357)

Most of the critical facts of this case are contained in the testimony of the witnesses and the trial exhibits which include the minutes of the Respondent Board. These minutes are not required by law to be maintained or open for public inspection. The petitioner has tried to mischaracterize the "Best Evidence" rule when, in fact, the Board minutes do not necessarily contain the "Best Evidence" of actions taken by the respondents relating to the termination of the petitioner. No matter how much the petitioner wishes to take out of context certain statements, either contained or not contained in Board minutes, the Board minutes do not provide better evidence than the other trial exhibits or the testimony of the witnesses offered during the trial of this case.

The petitioner argues the public confidence in minutes of public board meetings would be severely shaken without a rule suggested by the petitioner on page 33 of the petitioner's brief. While not conceding the petitioner's position regarding this theory, the respondent is not a public agency, body, commission or a board. The Board minutes are subject to the same "clearly erroneous" scrutiny as the rest of the trial exhibits and oral testimony presented during the trial of this case before the District Court.

SUMMARY OF THE ARGUMENT

I.

The Sole Legal Argument Made By The Petitioner That The Writ Should Be Granted Is "Inherently Flawed" Because Respondent Is Not A Public Agency Required By Law To Maintain Minutes Of Its Meetings.

The only legal authority cited in the entire brief of the peitioner is an Alabama Supreme Court decision which holds that the City of Bessemer, Alabama, being a public agency was required by law to maintain minutes of their meetings. Furthermore, as stated earlier in this brief, the petitioner herself characterized her appointment at the Mostellar Medical Clinic as a "private practice assignment." Finally, it is important to note that the District Court in this case found no "state action" to support plaintiff's claim under 42 U.S.C. Section 1983, holding that the respondents were private entities not acting under "Color of State Law"

Thus, the petitioner's entire argument is flawed from the very beginning.

II.

The District Court's Findings Are Not Clearly Erroneous.

Apparently, the petitioner argues that documentary evidence such as the minutes of the respondents are not

subject to the "clearly erroneous" standard of appellate review. The petitioner, however, is wrong. Rule 52(a) of the Federal Rules of Civil Procedure was amended on August 1, 1985 to make it perfectly clear that "documentary evidence" is also subject to the "clearly erroneous" rule. Even most "pre-amendment" cases held that the clearly erroneous rule was applicable where there was both documentary and oral testimony involved. Taking, the "entire evidence" in this case into consideration (both oral testimony and documentary evidence), the District Court findings are not clearly erroneous.

REASONS FOR DENYING THE WRIT

I. *The Sole Legal Argument Raised By The Petitioner That The Writ Should Be Granted Is "Inherently Flawed" Because The Respondent Is Not A Public Agency Required By Law To Maintain Minutes Of Its Meetings.*

The petitioner's sole "Reason for Granting the Writ" is stated on page 18 of her Petition, as follows:

> "In litigation involving *public* agencies, boards, and commissions, a Federal District Court's findings of fact should not be contrary to facts contained in lawful minutes of such *public* bodies without a showing that the minutes are in error."

Unfortunately for the petitioner, however, her entire legal argument is "inherently flawed" because respondent is a *private,* non-profit corporation, not a public body. Unlike a public body, the respondent is not required to keep minutes of its meetings. The *only legal authority* cited in the petitioner's entire petition and brief is the Alabama Supreme Court's decision of *Kimbrell v. City of Bessemer,* 380 So.2d 838 (Ala.1980). This case was against the City of Bessemer and, if the case is read carefully, this Honorable Court can see that the legal proposition cited therein is only applicable to public governmental bodies, such as cities or counties. The petitioner has apparently forgotten that she herself characterized her appointment to the Mostellar Medical Center as a *"private practice assignment."* She has also apparently forgotten that the District Court in this case ruled that because the respondents were *private entities,* they did not act under "Color of State Law" to support a claim under 42 U.S.C. Section 1983. (The petitioner did not appeal this portion of the District Court's ruling to the Eleventh Circuit Court of Appeals). See ***Mendez v. Belton,* 739 F.2d 15 (1st Cir. 1984)** (Court holding that extensive government regulation and receipt of federal funds does not transform an otherwise private entity into a governmental actor).

Thus, petitioner's sole legal argument for the granting of the writ is "inherently flawed" from the very beginning and is thus meritless.

II. *The District Court's Findings Are Not Clearly Erroneous.*

Petitioner (rather unusually) herself cites and refers to the August 1, 1985 amendment to Rule 52 of the Federal Rules of Civil Procedure on page 15 of her petition. The respondents, however, fail to understand why the petitioner cites the 1985 amendment to Rule 52 when the amendment clearly favors the *Respondents'* position in this case that the District Court's findings are not clearly erroneous, notwithstanding that part of the evidence introduced at the trial of this case was documentary. As amended Rule 52(a) makes so clear:

> "Findings of fact, *whether based on oral or documentary evidence,* shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In fact, under the present Rule even a case that is tried *solely* or largely on documentary evidence is, nevertheless, subject to the "clearly erroneous" standard. See *Steelmet, Inc. v. Caribe Towing Corporation,* 842 F.2d 1237 (11th Cir. 1988). Of course, in the present case, we are dealing with not only documentary evidence but also oral testimony from many live witnesses who testified at the trial of this case. Even "pre-amendment" cases construing Rule 52 hold that the "clearly erroneous" rule applies when both documentary and oral testimony are

involved. See e.g. *Anderson v. Property Developers, Inc.*, 555 F.2d 648 (8th Cir. 1977). These same "pre-amendment" cases also hold that the reviewing Court can overturn findings of fact only if a review of *"the entire evidence"* leaves the reviewing Court with the definite and firm conviction that a mistake has been committed. See e.g. *Bull's Corner Restaurant, Inc. v. Director of Federal Emergency Management Agency*, 759 F.2d 500 (5th Cir. 1985).

CONCLUSION

For all of the aforesaid reasons, the Writ should not be granted because: (1) the petitioner's sole legal argument is "inherently flawed" (because the respondent is not a *public* entity) and (2) because the District Court's findings are not "clearly erroneous", especially in light of the August 1, 1985 amendment to Rule 52(a).

Respectfully submitted,

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